Supreme Court, U.S.
FILED
OCT 16 2000
OFFICE OF THE CLERK

No. 00-627

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN ALAN EMERSON,

Petitioner,

v.

STANLEY TUGGLE and
THURBERT BAKER,

Respondents.

PETITION FOR WRIT OF CERTIORARI
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

John Alan Emerson, Pro Se
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71 pp

QUESTIONS PRESENTED

1. Whether the Court of Appeals lacked authority to construe the petitioner's notice of appeal as a motion for certificate of appealability.

2. Whether the circuit judge lacked authority to address the issue of whether a certificate of appealability should be granted to the petitioner.

3. Whether the decision of a single circuit judge concerning a certificate for appealability is subject to review by the entire court of appeals.

4. Whether the case record substantially shows that the petitioner was denied federal constitutional rights by the state courts.

PARTIES TO THE PROCEEDINGS

1. John Alan Emerson, Petitioner

2. Stanley Tuggle, Respondent

3. Thurbert Baker, Respondent

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Petitioner, John Alan Emerson, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in the case.

OPINIONS BELOW

The opinion of the district court is found in Appendix G. The U.S. Court of Appeals did not enter an opinion.

STATEMENT OF JURISDICTION

The judgment of the U.S. Court of Appeals for the Eleventh Circuit was entered on April 21, 2000. The petition for rehearing was denied on July 17, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2253(c)(1)

> Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from ... the final order in a proceeding under section 2255.

Rule 22(b) of the FRAP

(1) ... the applicant cannot take an appeal unless a circuit justice or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue. The district clerk must send the certificate or statement to the court of appeals with the notice of appeal and the file of the district court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

(2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.

28 U.S.C. § 2254(d)

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgement of a state court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly, established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding.

STATEMENT OF THE CASE

A. Proceedings Below

The petitioner was charged in a state indictment with the offense of aggravated assault upon his job supervisor. During the petitioner's criminal trial, the jury returned a verdict of not guilty on the aggravated assault charge. The jury returned a verdict of guilty on the unindicted battery charge as a lesser included offense of aggravated assault. The trial court subsequently entered a judgement on this verdict.

The petitioner appealed his judgment of conviction to the Georgia Court of Appeals. The Court affirmed the conviction. Petitioner filed a petition for Writ of Certiorari with the Georgia Supreme Court. The court denied the petition. The petitioner filed a petition for habeas corpus in the federal district court. The magistrate judge reviewed the petition and recommended that it be denied. The district court adopted the magistrate's recommendation. The petitioner filed a notice of appeal of the court's order, denying his petition for habeas corpus. The petitioner later filed a motion for certificate of probable cause in

the district court. The court denied this motion. The petitioner filed a notice of appeal of the court's order, denying the motion for certificate of probable cause.

Both appeals were docketed in the appellate court. The parties were ordered by the court to submit briefs on the question of whether the district court's order, denying the motion for probable cause, was appealable to this court. The briefs were filed and considered by the court. The court construed the notice of appeal as a request for certificate of appealability. A circuit judge later denied the court-construed request. The petitioner filed a suggestion for an en banc hearing. The suggestion was denied. This case is now before this court on the petition for writ of certiorari.

B. **Statement of Facts**

The petitioner's job supervisor assaulted the petitioner with a phone receiver at their work location. The petitioner had a work crowbar in his hand at the time of the assault. To prevent his job supervisor from causing him further bodily harm, the petitioner restrained his supervisor in a bearhug.

After the two were separated by other employees, the supervisor alleged that the petitioner hit him in the head with the crowbar. The police were called to the scene, and the petitioner was arrested and charged with aggravated assault. An indictment was later filed against the petitioner, charging him only with the offense of aggravated assault. The petitioner retained an attorney to defend him during his trial.

At the start of the petitioner's criminal trial, he informed his attorney that he did not desire the jury to consider any lesser included offenses. Defense counsel disregarded the petitioner's instructions and requested a jury charge on battery as a lesser included offense of aggravated assault. Battery was not a lesser included offense of aggravated assault, nor was battery alleged in the indictment. The trial court erroneously charged the jury on battery as a lesser included offense of aggravated assault. Defense counsel also requested a jury charge on accident. The trial court denied this request. Defense counsel did not request a jury charge on self-defense.

Following deliberations, the jury returned a verdict of not guilty on the aggravated assault charge and a guilty verdict on the unindicted battery charge. The trial court sentenced the petitioner to serve time in the county jail.

ARGUMENT AND CITATION OF AUTHORITY

A. The Court of Appeals Lacked Authority to Construe the Petitioner's Notice of Appeal as a Motion for Certificate of Appealability.

The Court of Appeals was not authorized by any statutory provision to construe the petitioner's notice of appeal as a motion for certificate of appealability. The circuit judge did not cite any statutory provision in its order which authorized the Court of Appeals to construe petitioner's notice of appeal as a motion for certificate of appealability. The judge also did not indicate in the order whether such meaning was given to petitioner's notice of appeal of the district court's order, denying the petition for habeas corpus or the petitioner's notice of appeal of the district court's order, denying the motion for probable cause (certificate of appealability).

The petitioner assumed that the Court of Appeals relied on 28 U.S. C. § 2253(c) and Federal Rule of Appellate Procedure 22(b) in construing petitioner's notice of appeal as a motion for a certificate of appealability. The petitioner also assumed that such meaning was given to both notices of appeal.

There is no specific provision in 28 U.S.C. §2253(c) which authorized the Court of Appeals to construe a notice of appeal as a request for certificate of appealability. However, Rule 22(b) does provide the Court with that authority when the district court denies the petitioner's request for the certificate and no express request is made to the Court of Appeals following the denial. Fed. R. App. P.22(b). Rule 22(b) is silent as to whether the petitioner can appeal the district court's denial of the motion for certificate appealability to appellate court by filing a second notice of appeal. **Id.** There is no language in Rule 22(b) or §2253(c) which bars the petitioner from filing such an appeal. There is also no language in Rule 22(b) or §2253(c) which bars review on the merits of the second appeal. Rule 22(b) provides no provision authorizing the Court of Appeal to construe the second notice of appeal as a motion for certificate of appealability. **Id.** The Court of Appeals has only such appellate

authority as Congress has granted, and its jurisdiction is wholly statutory. Carroll v. United States, 354 U.S. 394, 77 S. Ct. 1332 (1957). Under 28 U.S.C. § 1295, the Court of Appeals has exclusive jurisdiction to review a final decision of the district court. Congress has not acted to limit this jurisdiction when a petitioner opts to appeal the district court's order denying his motion for certificate of appealability instead of requesting the Court of Appeals to issue the certificate.

Because the petitioner filed a notice of appeal of the district court's order denying his motion for certificate of appealability, the Court of Appeals was not authorized under §2253(c) or Rule 22(b) to construe his second notice of appeal as a request for certificate of appealability. **Id.** Rule 22(b) is limited to the notice of appeal of the order denying the petition for habeas corpus. **Id.** Congress has not enacted any statutes which bar the habeas corpus petitioner from directly appealing a district court's order denying his motion for a certificate of appealability or which prevent the Court of Appeals from reviewing the merits of such appeal. The jurisdiction of the Court of Appeals is exclusively appellate. Roche v. Evaporated Milk Association, 319 U.S. 21, 63S. Ct. 938 (1942). The Court

of Appeals is not endowed with any original jurisdiction. Whitney v. Dick, 202 U.S. 132, 26 S. Ct. 584 (1906). Jurisdictional issues are not subject to the Court of Appeals' discretion. Phelps v. Washburn University of Topeka, 807 F. 2d 153 (10th Cir. 1985). There is no language in §2253(c) or Rule 22(b) which eliminates the Court's appellate jurisdiction over an appeal of the district court's order denying the motion for certificate of appealability.

B. The Circuit Judge Lacked Authority To Address the Issue of Whether a Certificate of Appealability Should be Granted to the Petitioner.

The circuit judge was not authorized to considered whether the petitioner should be granted a certificate of appealability under 28 U.S.C. §2253(c) and Federal Rule of Appellate Procedure 22(b). Rule 22(b) and §2253(c) do not expressly authorize a single judge to consider whether a certificate of appealability should be granted where no request for such certificate was made to the Court of Appeals. The petitioner herein did not request the Court of Appeals or a circuit

judge to issue a certificate of appealability. Absent such a request, Rule 22(b) provides that the notice of appeal will be construed as a request for the certificate, and addressed to the judges of the Court of Appeals (not a circuit judge). Thus, under these circumstances, it is the "judges of the court of appeals" and not a single circuit judge who must consider whether a certificate of appealability should be granted under §2253(c) and Rule 22(b).

C. The Decision of a Single Circuit Judge Concerning a Certificate for Appealability is Subject to Review by the Entire Court of Appeals.

The circuit judge's denial of the certificate for appealability is reviewable by the entire Court of Appeals. Federal Rule of Appellate Procedure 27(c) provides that the action of a single judge may be reviewed by the court of appeals. Fed. R. App. P. 27(c). The United States Supreme Court also recognized that the decisions made by individual circuit judges are subject to correction by the entire court of appeals. Hohn v.

U.S., _U.S._, 118 S. Ct. 1969 (1998).

The circuit judge erred in concluding that the petitioner failed to make a substantial showing of the denial of a constitutional right. The record in this case clearly shows that the petitioner was denied his constitutional rights which included, but were not limited to:

(1) the right not to be convicted of a criminal offense which was not alleged in the indictment;
(2) the right to be present during the jury charge conference;
(3) the right to personally make the decision whether to request a charge on a lesser included offense;
(4) the right to have the jury charged on accident; and
(5) the right to effective assistance of counsel during the criminal trial.

The entire appellate court should have reviewed the appeal to determine whether such a substantial showing could be found in the case record. If the decision of the circuit judge is not corrected, it will cause the petitioner's appeal to be dismissed

prior to any review by the entire court on the merits. Such a dismissal would be contrary to the provision in Rule 27(c) which provides "that a single judge may not dismiss or otherwise determine an appeal or other proceeding." Fed. R. App. P. 27(c). This language suggests that the entire court of appeals must review the decision of a single circuit judge which has the effect of disposing of an appeal. Thus, the decision of the circuit judge is subject to en banc review by this court to determine whether the case record shows a substantial denial of constitutional rights.

D. The Case Record Substantially Shows That the Petitioner was Denied his Federal Constitutional Rights by the State Courts.

The record in this case substantially shows that the state courts denied petitioner federal constitutional rights when he was tried on the indicted charge of aggravated assault and convicted on the unindicted offense of battery. 28 U.S.C. §2253(c) and Federal Rule of Appellate Procedure 22(b) require that a habeas corpus petitioner obtain a certificate of appealability before his appeal is reviewed on the merits by the Court of Appeals, supra. Section 2253(c)(2) further provides that such certificate may

issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). Such showing was made by the petitioner in his petition for habeas corpus, his reply to the respondent's answer to the petition and the motion for certificate of appealability, filed in the district court.

Petitioner was denied his constitutional right to due process of law when he was convicted of a criminal offense which was not alleged in the indictment and which was not a lesser included offense of the indicted charge of aggravated assault. In Jackson v. Virginia, 443 U.S. 307, 314 (1979), the Supreme Court held that a conviction on a charge not found in the indictment violates the due process provision of the federal constitution. **Id.** In United States v. Artrip, 942 F.2d 1568 (11th Cir. 1991), this court held that such a conviction constitutes reversible error. **Id.** Based on the above facts and constitutional law, a reasonable person would find that the petitioner substantially showed a denial of his federal constitutional due process rights.

Petitioner was also denied his federal constitutional right to be present during every stage of the state criminal proceedings, including the jury charge conference. In Faretta v. California, 422 U.S. 806, 819 45 L.Ed 2d. 562, 572 (1975), the Supreme Court recognized that a defendant had a federal constitutional right to be present at all stages of the criminal trial where his absence might frustrate the fairness of the proceedings. **Id.** In this case, the petitioner was not present during the jury charge conference and he did not knowingly waive his rights to be present. During the conference, defense counsel requested a jury charge on battery as a lesser included offense of aggravated assault without the consent of the petitioner. Prior to the conference, the petitioner informed his counsel that he did not desire a request to charge the jury on a lesser included offense. Defense counsel ignored his client's instructions and requested the jury charge on battery. Petitioner was not aware of the charge on battery until the court read it to the jury. The petitioner did not believe that he could state any objections to the charge while the court was reading it or immediately after the court had read it. The petitioner complained to his attorney concerning the jury charge on battery. Petitioner would have prevented his counsel from requesting the battery charge had he

been present during the charge conference. As a result of the requested charge on battery, the petitioner was convicted of the battery offense as a lesser included offense of aggravated assault.

Based on the above facts and case law, a reasonable person would have concluded that a substantial showing of a denial of the federal constitutional due process right was made by the petitioner.

Petitioner was also denied his Sixth Amendment right to effective assistance of trial counsel. The standard for determining whether defense counsel was ineffective was established by the Supreme Court in Strickland v. Washington, 466 U.S. 668, 687 (1984). The Strickland test is two-prong. **Id.** The defendant must first show that defense counsel's performance was deficient. **Id.** This first prong requires the defendant to show that his counsel made errors so serious that counsel was not functioning at the level required by the Sixth Amendment. The defendant must next show that he was prejudiced by the deficient performance of his defense counsel. **Id.** The second prong requires the defendant to show that

defense counsel deficient performance deprived him of a fair trial.

The petitioner in this case satisfied both prongs of the Strickland test. Petitioner's trial counsel was deficient when he requested a jury charge on battery as a lesser included offense of aggravated assault without the petitioner's knowledge or consent. Defense counsel had received prior instructions from the petitioner directing counsel not to request a jury charge on any lesser included offense of aggravated assault. Counsel disregarded petitioner's instructions and requested a jury charge on battery as a lesser included offense of aggravated assault. The defendant should be the one who decides whether a charge on a lesser included offense should be submitted to the jury and not his attorney. Commentary to 1 ABA Standards for Criminal Justice §4-52. This decision is similar to the defendant's decision about the charges to which to plea. **Id.** Defense counsel's failure to comply with the petitioner's instructions, directing counsel not to request a jury charge on a lesser included offense, made counsel's trial performance deficient.

The petitioner was prejudiced as a result of his counsel's deficient trial performance. "But for" such performance, the petitioner would not have been convicted of the battery offense. This offense was not alleged in the indictment against the petitioner.

The petitioner was also denied effective assistance of counsel when his trial counsel failed to request a charge on self-defense. There was trial testimony which supported a charge on self-defense. The petitioner testified that the alleged victim attacked him first with a phone receiver and that he defended himself during the physical scuffle by restraining the alleged victim in a bearhug while holding his work crowbar in his hands. Defense counsel's trial performance was deficient when he failed to request a jury charge on self-defense and his client was unduly prejudiced as a result of the deficiency. "But for" such deficient performance, the petitioner would not have been convicted of battery.

Based on the above facts and constitutional law, the petitioner substantially showed that he was denied his constitutional right to effective assistance of counsel.

The petitioner was also denied his federal constitutional right to a fair trial when the trial court refused his request to charge the jury on accident. Failure of the trial court to give a requested charge raises an issue of constitutional dimension only if it renders the entire trial fundamentally unfair. Smith v. Smith,454 F.2d 572, 579 (5th Cir. 1971); Carrizales v. Wainwright, 699 F.2d 1053, 1055 (11th Cir. 1983).

There was trial testimony which supported the charge. The petitioner testified that he did not intentionally hit the alleged victim on his head with the crowbar. The petitioner further testified that the alleged victim charged towards him while the petitioner was holding the crowbar in his hand. The jury could have determined from these facts that the alleged victim accidentally collided with the crowbar when he charged towards the petitioner, or when the alleged victim struggled while the petitioner held him in a bearhug. The jury would have been authorized by a charge on accident to acquit the petitioner on the battery charge had the court charged the jury on accident as requested by the petitioner.

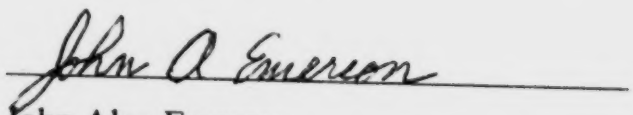
Without a charge on accident, defense counsel was unable to provide the petitioner with a complete and effective defense to the battery charge. The absence of a complete defense resulted in the petitioner's conviction on the battery charge. "But for" the court's failure to charge the jury on accident, the petitioner would not have been convicted of the battery offense.

Based on the above facts and constitutional law, a reasonable person would have found that the petitioner again showed a denial of his federal constitutional due process rights.

CONCLUSION

For the foregoing reasons, this court should grant this petition for certiorari and review this appeal on the merits.

This 16th of October, 2000.



John Alan Emerson

Pro se Petitioner

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 99-12581-I

JOHN ALAN EMERSON,

Petitioner-Appellant,

versus

STANLEY TUGGLE,
THURBERT BAKER,

Respondents-Appellees.

Appeal from the United States District Court for the
Northern District of Georgia

Before DUBINA and CARNES, Circuit Judges.

BY THE COURT:

This Court construes appellant's "suggestion for rehearing en banc" as a motion for reconsideration. Upon reconsideration

of this Court's order dated April 21, 2000 appellant's motion for a certificate of appealability, construed from his notice of appeal, is DENIED because appellant has not made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 99-12581-I

JOHN ALAN EMERSON,

Petitioner-Appellant,

versus

STANLEY TUGGLE,

THURBERT BAKER,

Respondents-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

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ORDER:

This Court construes appellant's notice of appeal as a motion for a certificate of appealability. Appellant's motion for a certificate of appealability is DENIED because appellant has

failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

/s/ Charles R. Wilson

UNITED STATE CIRCUIT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 99-14640-I

JOHN ALAN EMERSON,

Petitioner-Appellant,

versus

STANLEY TUGGLE,

THURBERT BAKER,

Respondents-Appellees.

Appeal from the United States District Court for the
Northern District of Georgia

Before Edmondson, Cox and Wilson, Circuit Judges.

BY THE COURT:

This appeal is **DISMISSED** for lack of jurisdiction. This district court's October 4, 1999, order denying Appellant John Alan Emerson's petition for certificate of probable cause is not a final and appealable decision. See 28 U.S.C. § 1291.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOHN ALAN EMERSON,	:	
Petitioner,	:	
v.	:	CIVIL ACTION
	:	NO. 1:97-CV-0080-JTC
	:	
STANLEY TUGGLE, Sheriff,	:	HABEAS CORPUS
	:	28 U.S.C. § 2254
Respondent.	:	

ORDER

This matter is before the Court upon Petitioner's Motion for a Certificate of Probable Cause. The Court has reviewed the record and does not find a substantial showing of a denial of a constitutional right. Therefore, Petitioner's Motion for a Certificate of Probable Cause is hereby **DENIED.**

SO ORDERED, this 4 day of October, 1999.

/s/ Jack Camp

JACK T. CAMP

UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOHN ALAN EMERSON,	:	
Petitioner,	:	CIVIL ACTION FILE
	:	
vs.	:	NO. 1:97-cv-80-JTC
	:	
STANLEY W. TUGGLE,	:	
Respondent.	:	

JUDGMENT

This petition for a writ of habeas corpus having come before the court, Honorable Jack T. Camp, United States District Judge, for consideration, and the petition having been considered and the court having rendered its opinion, it is

Ordered and Adjudged that the petition for a writ of habeas corpus be, and the same hereby is **denied** and **dismissed.**

Dated at Atlanta, Georgia, this 15th day of June, 1999.

LUTHER D. THOMAS
CLERK OF COURT
By: /s/ Debra James

_____

Deputy Clerk

Prepared, Filed and Entered
in the Clerk's Office
June 15, 1999
Luther D. Thomas
Clerk of Court

By: /s/ Debra James

_____

Deputy Clerk

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOHN ALAN EMERSON,	:	HABEAS CORPUS
	:	28 U.S.C. § 2254
Applicant,	:	
	:	
vs.	:	
	:	CIVIL ACTION NO.
STANLEY W. TUGGLE,	:	NO. 1:97-CV-80-JTC
	:	
Respondent.	:	
	:	

ORDER

This Case is before the Court on the Report and Recommendation of Magistrate Judge Joel M. Feldman [#9-1] and Petitioner's objections thereto [#10-1]. The Magistrate recommend that this Court deny Applicant's petition for a writ of habeas corpus [#1-1].

In accordance with 28 U.S.C. § 636 (b)(1) and Rule 72 of the Federal Rules of Civil Procedure, this Court has conducted a careful, de novo review of the Magistrate's recommendation

denying the Applicant's petition. After a thorough review of Petitioner's objections, this Court concludes that the Magistrate's Report and Recommendation is correct in all material respects. According, this Court **ADOPTS** the Magistrate's Report and Recommendation as the opinion of this Court. Plaintiff's objections are **OVERRULED.**

For the reasons set forth in the Magistrate's Report and Recommendation, Applicant's petition for a writ of habeas corpus [#1-1] is **DENIED.**

SO ORDERED, this 10 day of June, 1999.

/s/ Jack Camp

JACK T. CAMP
UNITED STATES DISTRICT JUDGE

Emerson.r&robj

APPENDIX G

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

JOHN ALAN EMERSON, Applicant,	:	HABEAS CORPUS 28 U.S.C. § 2254
vs.	:	
STANLEY W. TUGGLE, Sheriff, Respondent.	:	CIVIL ACTION NO. NO. 1:97-CV-80-JTC

ORDER

Attached is the report and recommendation of the United States Magistrate Judge in this action in accordance with 28 U.S.C. § 636(b)(1) and this Court's Civil Local Rule 72 or Criminal Local Rule 58. Let the same be filed and a copy, together with a copy of this Order, be served upon counsel for the parties.

Pursuant to 28 U.S.C. § 636(b)(1), each party may file written objections, if any, to the report and recommendation within ten (10) days of service of this Order. Should objections be filed, they shall specify with particularity the alleged error or

errors made (including reference by page number to the transcript if applicable) and shall be served upon the opposing party. The party filing objections will be responsible for obtaining and filing the transcript of any evidentiary hearing for review by the District Court. If no objections are filed, the report and recommendation may be adopted as the opinion and order of the District Court and any appellate review of factual findings will be limited to a plain error review. United States v. Slay, 714 f.2d 1093 (11th Cir. 1983), cert. denied, 464 U.S. 1050, 104 S. Ct. 729, 79 L. Ed. 2d 189 (1984).

The Clerk is directed to submit the report and recommendation with objections, if any, to the District Court after expiration of the above time period.

IT IS ORDERED, this 17th day of May, 1999.

/s/ Joel M. Feldman

JOEL M. FELDMAN
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOHN ALAN EMERSON,[1] Applicant,	:	HABEAS CORPUS 28 U.S.C. § 2254
vs.	:	
STANLEY W. TUGGLE, Sheriff, Respondent.	:	CIVIL ACTION NO. NO. 1:97-CV-80-JTC

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Presently pending before the Undersigned is John Alan Emerson's 28 U.S.C. § 2254 Application for a Writ of Habeas Corpus [Doc. 1], the Respondent's Answer-Response [Doc. 3], and the applicant's reply. [Doc. 5].

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[1]Ironically, the applicant also sued Delta Air Lines, Inc. for violating his civil rights under Title VII of the Civil Rights acts of 1964 (42 U.S.C. § 2000e et seq.), when it fired him because of this incident, which case was assigned to, and handled by the Undersigned. See Emerson v. Delta Air Lines, Inc., Civil Action Nol. 1:96-CV-1939 (N.D.Ga. Report and Recommendation of June 20, 1997, Feldman, M.J.) (adopted as District Court's Order on June 19, 1998, Camp, J.) (appeal pending).

PART ONE HISTORY OF THE CASE

On March 9, 1994, the Clayton County grand jury returned indictment number 94-CR 1075-8 against the applicant which charged one count of aggravated assault with a deadly weapon. (Record on Appeal (hereinafter "R.") at 3-4).[2] The indictment charged that on March 9, 1994, the applicant "did unlawfully make an assault upon the person of Don Hamel with a certain crowbar, a deadly weapon as used, and one which when used offensively against a person is likely to result in serious

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[2]The respondent has filed additional exhibits also. As none of these exhibits were assigned an exhibit number by the respondent this Court has elected to do so as follows: RX-1 (record on appeal); RX-2 (November 14, 1995, Motion in Arrest of Judgment and Motion for New Trial Hearing Transcript, hereinafter "MNTI"); RX-3 (November 30, 1995, continued Motion in Arrest of Judgment and Motion for New Trial Hearing Transcript, hereinafter "MNT2"); RX-4 (Vol. I of the Trial Transcript, hereinafter "1TR") RX-5 (Vol. II of the Trial Transcript, hereinafter "2Tr"); RX-6 (Vol. III of the Trial Transcript, hereinafter "3TR"); RX-7 (Vol. IV of the Trial Transcript, hereinafter "4TR"); RX-8 (the Georgia Court of Appeals opinion affirming applicant's conviction, see Emerson v. State, 222 Ga. App. 569, 474 S.E. 2d 638 (1996)). Further, in response to the Court's March 30, 1998, Order to Supplement of the Answer-Response, the respondent has filed exhibits to which the Court has assigned the following exhibit numbers: RX-9 (the applicant's Brief and Enumerations of Errors to the Georgia Court of Appeals); and RX-10 (the state's responsible brief in the Georgia Court of Appeals). Additionally, the respondent has filed copies of pages 361 to 366 of the trial transcript, which were missing from the original exhibit.

bodily injury." Id.

While represented by attorney William West, the applicant was tried in the Clayton Superior Court before the Honorable Matthew O. Simmons and a jury, and, on August 23, 1995, convicted of simple battery, a misdemeanor, and a lesser included offense (LIO) of aggravated assault.[3] (R-22). He was sentenced to a term of 12 months, to serve 90 days with the balance probated. (R-23).

On September 29, 1995, while represented by new counsel, attorney Michael B. King, the applicant filed a Motion For New Trial (MNT) (R-36), alleging that (1) the court erred in (a) instructing the jury on battery, (b) refusing the defendant's request to instruct the jury on accident; (2) trial counsel rendered ineffective assistance and (3) the evidence was insufficient to support the battery conviction, and on October 31, 1995, a

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[3]Simple battery, a misdemeanor, which requires physical contact, is not necessarily a LIO of aggravated assault with a deadly weapon as charged in the indictment because the offense charged does not require that the vicitim be touch. See Tuggle v. State, 145 Ga. App. 603, 244 S.E. 2d 131 (1978). Nevertheless, the evidence at trial was overwhelming and shows that the applicant hit the victim's head with a crowbar – a physical contact which constituted at the very least simple battery.

Motion In Arrest Of Judgment (MAJ). (R-46). On November 14, 1995, the Honorable Matthew O. Simmons, Clayton Superior Court, conducted a hearing on the MNT and MAJ, at which he received the testimony of the applicant. (MNT1). The hearing was continued until November 30, 1995, at which time Judge Simmons received testimony from the applicant and William West, trial counsel. (MNT2). In a November 30, 1995, one-sentence Order, Judge Simmons denied the MNT and the MAJ, which Order failed to include Findings of Fact. (R-64).

In due course, while still represented by King, the applicant appealed his conviction to the Georgia Court of Appeals, which, on August 5, 1996, affirmed the same. (RX-8, Emerson v. State). In its decision, the court noted that the appellant raised five issues, mot of which challenged jury instructions trial counsel requested or failed to request. Id. It then held the trial counsel was not ineffective for requesting the LIO battery instruction or for not requesting instructions on (a) self-defense or (b) accident. Id. It also ruled that self-defense and accident instructions were inconsistent with the applicant's defense - - that he never struck the victim.

On January 10, 1997, still represented by King, the applicant filed the instant application, raising five grounds to wit:[4]

1. Trial Counsel Rendered Ineffective Assistance:
   A. When He Requested an Instruction on the LIO of Battery, Over Applicant's Objection (Ground III); and
   B. When He Failed to Request an Instruction on Self-Defense (Ground IV);

2. Applicant Was Denied Due Process When the Trial Court:
   A. Instructed the Jury That It Could Convict the Applicant of the LIO of Battery (Ground II); and
   B. Failed to Instruct the Jury on Accident (Ground V);

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[4]The respondent alleges that the applicant was scheduled to be released from custody on February 19, 1997, and therefore his application has become moot. [See Doc. 3 at 1]. However, a habeas corpus application does not become moot solely because the habeas applicant is released from prison while the application is pending, and the respondent alleges no other reasons why the application is now moot. See Spencer v. Kemna, 532 U.S., 1, 118 S. Ct. 978, 140 L. Eed. 2d 43 (1998).

3. Applicant Was Denied Due Process When He Was Convicted of an Offense Not Set Out in the Indictment (Ground I).

[Doc. 1].

On February 17, 1997, the respondent filed his answer and brief, together with the foregoing exhibits [Docs. 3, 4], in response to this Court's Show Cause Order. [Doc. 2]. The applicant has filed a reply to the answer. [Doc. 5].

PART TWO THE ISSUES

1. Whether the Applicant Received Effective Assistance of Trial Counsel:

   A. When Trial Counsel Requested a Jury Instruction on Battery as a LIO of Aggravated Assault Over Applicant's Objections (Ground III); and

   B. When Trial Counsel Failed to Request a Jury Instruction on Self-Defense (Ground IV).

2. Whether the Trial court Denied the Applicant's Due Process Rights:

   A. When the Trial Court Instructed The Jury on the LIO of Battery, Which Was Not Included in the Aggravated Assault Indictment (Ground II); and

   B. When the Trial Court Failed to Instruct the Jury on the Defense of Accident (Ground V).

3. Whether Applicant Was Denied Due Process When He Was Convicted of Simple Battery, an Offense Not Set Out in the Indictment (Ground I).

PART THREE FINDINGS OF FACT[5]

A. This Court adopts as its first Finding of Fact the foregoing History of the Case.

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[5]The State court's findings of fact are entitled to a presumption of correctness. 28 U.S.C. § 2254(e)(1).

B. The applicant raised all of the claims that he asserts in the instant application in his appeal to the Georgia Court of Appeals.

C. The Georgia Court of Appeals found:

1. The applicant was indicted on a charge of aggravated assault, but convicted of misdemeanor battery as a lessor included offense.

2. The victim, the applicant's supervisor at Delta Airlines, instructed the applicant to leave the break area and get back to work.

3. Another employee informed the victim that after receiving this instruction the applicant had thrown his coffee all over the break area.

4. The victim then located the applicant, instructed him to clean up the mess, and went into an office to use the telephone.

5. The applicant walked into the office, admitted that he was about to "lose it," and struck the victim in the head with a crowbar, causing a laceration that required 14 staples.

6. The victim then struggled with the applicant, who had raised the crowbar to strike again.

7. The victim subsequently filed a civil suit against the applicant.

8. Additional witnesses testified that they saw the applicant argue with the victim, throw the coffee, retrieve his crowbar from his tool chest, follow the victim with crowbar in hand, raise the crowbar and swing it, and that they broke up the ensuing struggle.

9. The applicant's trial counsel requested the jury instruction on battery. (See Tr. 362; R-11).

10. The applicant's trial counsel testified that before trial, the applicant denied ever striking the victim with the crowbar.

Emerson v. State, 222 Ga. App. At 596-97, 474 S.E. 2d at 639.

PART FOUR CONCLUSIONS OF LAW

A. Standard of Review

A Federal court may not grant habeas relief for claims previously adjudicated on the merits by a State court unless the State court adjudication resulted in a decision that (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d).

In Neelley v. Nagle, 138 F.3d 917 (11th cir. 1998), cert. denied, 119 S. Ct. 811 (1999), the United States Court of

Appeals for the Eleventh Circuit established a three-part test to determine whether a state court adjudication, resulted in a decision that was "contrary to or involved an unreasonable application of clearly established" federal law. First, the court must ascertain the clearly established federal law as determined by the Supreme Court. Neelley, 138 F.3d at 924. To identify the clearly established federal law, the court must "'survey the legal landscape' at the time the state court adjudicated the petitioner's claim." Neelley at 923. The law is clearly established "if Supreme Court precedent would have compelled a particular result in the case." Id.

Next, the court must determine whether the state court adjudication is contrary to the clearly established Supreme Court case law, either because the state court failed to apply the proper Supreme Court precedent, or because the state court reached a different conclusion on substantially similar facts. Neelley at 924.

If the state court's decision is not contrary to clearly established federal law, the reviewing court must then determine whether the state court unreasonable applied the relevant

Supreme Court authority. Id. Under this step, the federal court can grant the writ "'only if a [S]tate court decision is so clearly incorrect that it would not be debatable among jurists.'" Id. (Quoting Drinkard v. Johnson, 97 F.3d 751, 765 (5th /cur, 1996), cert. denied, 520 U.S. 1107, 117 S. Ct. 1114, 137 l. Ed. 2d 315 (1997)).

B. Presumption of Correctness and Evidentiary Hearing

This Court must presume a determination of any factual issue made by a state court to be correct, unless an applicant rebuts the presumption with clean and convincing evidence. 28 U.S.C. § 2254(e)(1).

Indeed, this Court is prohibited from holding a federal evidentiary hearing unless the applicant shows that (a) his claims rely on a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court that was previously unavailable; or the claim relied on a factual predicate that could not have been previously discovered by due diligence, or by (b) the facts underlying the claims would be sufficient to show by clear and convincing evidence that, but for the constitutional

error, no factfinder would have found him guilty of underlying offense. 28 U.S.C. § 2254(e)(2).

This Court has reviewed the pleadings and exhibits and finds that the trial court and the Georgia Court of Appeals decisions were made after full and fair state proceedings. Accordingly, their Findings of Fact are binding on this Court. It also finds that the pleadings and exhibits contain sufficient facts for this Court's consideration of the issues raised. Therefore, no federal evidentiary hearing is required, and the case is now ready for disposition.

C. The Applicant Received Reasonably Effective Assistance of Counsel (Grounds III, IV).

To prevail on a claim of ineffective assistance of counsel, an applicant must show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defendant. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In determining whether counsel's performance was deficient, the reasonableness of the challenged conduct is considered "on the facts of the particular

case, viewed as of the time of counsel's conduct." Id. At 690. A deficiency is prejudicial where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. At 694.

Furthermore, strategic decisions (trial tactics) based on informed choices rarely provide a basis for a determination of ineffectiveness assistance. Williams v. Kemp, 846 F.2d 1276 (11th Cir. 1988), cert. denied, 494 U.S. 1090, 110 S. ct. 1836, 108 L. Ed. 2d 965 (1990). This Court is not to second-guess an attorney's strategy, but rather to see if that strategy was reasonable. Zamora v. Dugger, 834 F.2d 956 (11th Cir. 1987). Finally, with regard to prejudice, speculation is insufficient; an applicant must present evidence showing that he suffered "specific instances of actual prejudice." Aldrich v. Wainwright, 777 F.2d 630, 634 (11th Cir. 1985), cert. denied, 479 U.S. 918, 107 S. Ct. 324, 93 L. Ed. 2d 297 (1986).

In rejecting the applicant's ineffective assistance of trial counsel claims, the Georgia Court of Appeals held that:

Emerson failed to make the requisite showing of prejudice with regard to his assertion that counsel was ineffective for requesting the battery charge. The evidence against Emerson was overwhelming. In addition to the victim's testimony, other corroborating witnesses saw Emerson argue with the victim, throw the coffee, retrieve his crowbar from his tool chest, follow the victim with crowbar in hand, raise the crowbar, and swing it. They also testified to breaking up the ensuing struggle. But for counsel's request for the battery charge, given the overwhelming evidence of guilt, it is highly likely that Emerson would have been convicted of aggravated assault. Because Emerson failed to demonstrate that he was prejudiced by what was undoubtedly a tactical decision the trial court did not clearly err in finding that Emerson's counsel was not ineffective.

Emerson's counsel was not ineffective for failing to request a charge on self-defense because the evidence did not support that charge. Emerson's counsel testified that before trial Emerson denied ever striking the victim with the crowbar, a statement in keeping with Emerson's trial

> testimony. Because such testimony was inconsistent with the theory that Emerson struck the victim with the crowbar in self-defense, the decision not to request that charge was appropriate.

Emerson v. State, 222 Ga. App. At 596-97, 474 S.E. 2d at 639 (citations omitted).

Trial counsel's decisions to request a jury instruction on battery and to not request a jury instruction on self-defense were legitimate trial tactics, not ineffective assistance. Trial counsel testified at the Motion for New Trial hearing that after hearing evidence, he feared that the jury would find the applicant guilty of aggravated assault. Therefore he made a strategic decision to request an instruction on the LIO of battery (i.e. a safety net). (RX-3 at 5-7, 12-14, 19).

The attorney also testified that he elected to not request an instruction on self-defense because the applicant refused to admit that he intentionally struck the victim. Consequently, there was no evidence to support such an instruction. (Id. At 6-7, 20-21).

These reasonable tactical decisions do not constitute ineffective assistance of counsel. Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979). Nor is the applicant entitled to habeas corpus relief merely because the attorney may have failed to consult with the applicant before pursuing these strategies, or even because of the attorney's decision to pursue the strategies notwithstanding the applicant's objection. United States v. Rhoads, 617 F.2d 1313 (8th Cir. 1980); Maynor v. Green, 547 F. Supp. 264 (S.D. Ga. 1982).

Indeed, had the attorney not requested an instruction on battery there was a substantial likelihood that the jury would have convicted him of aggravated assault - - a felony.

The issue of effective assistance of counsel is a mixed question of law and fact. This Court is compelled to conclude that the Georgia Court of Appeals' ruling that the applicant received the effective assistance of counsel was not "contrary to, or involved an unreasonable application of, clearly established federal law." 28 U.S.C. § 2254(d). Nor can the Court conclude that the ruling "was based on an unreasonable determination of the facts in light of the evidence presented in the state court

proceeding." Id. Therefore, this ground is without merit.

D. The Trial Court Did Not Violate the Applicant's Due Process Rights (1) When It Instructed The Jury on Battery, Which Was Not Included in the Aggravated Assault Indictment (Ground II); and (2) When It Refused to Instruct the Jury on the Defense of Accident (Ground V).

1. The Battery Instruction

The applicant contends that he is entitled to habeas corpus relief because the trial court violated his due process rights when it instructed the jury on the LIO of simple battery. The Georgia Court of Appeals refused to consider whether the Court's simple battery instruction violated the applicant's due process rights because the applicant's counsel had requested the instruction; and invited error cannot serve as a basis for relief, to wit: "[t]he trial court did not commit reversible error by instructing the jury on battery because [the applicant's] counsel requested the charge. Such self-induced error cannot be complained of on appeal," an independent state ground. Emerson v. State, 222 Ga. App. At 596.

A Federal court is barred from reviewing an applicant's Federal claims when the applicant has failed to comply with an independent and adequate state procedural rule, unless the applicant can show either (1) cause for the default and actual prejudice growing out of the alleged violation of Federal law, or (2) a resulting fundamental miscarriage of justice if the Federal court does not consider the claims. McCoy v. Newsom, 953 F.2d 1252, 1258 (11th Cir.), cert. denied, 504 U.S. 944, 112 s. Ct. 2283, 119 L. Ed. 2d 208 (1992). A procedural default will not bar consideration of a Federal claim unless the last state court rendering judgment on the claim "clearly and expressly" states that its judgment is based on a state procedural bar. Harmon v. Barton, 894 F. 2d 1268, 1272 (11th Cir.), cert. denied, 498 U.S. 832, 111 S. Ct. 96, 112 L. Ed. 2d 68 (1990).

Because the Georgia Court of Appeals clearly and expressly rejected the applicant's claim on the basis of an independent and adequate state procedural ground, the applicant must demonstrate both cause and prejudice to excuse his procedural default of requesting the battery instruction.

To establish cause, an applicant must show that some objective factor external to the defense impeded counsel's efforts to comply with the state's procedural rule. Murray v Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639, 2646, 91 L. Ed. 2d 397 (1986). To show prejudice, an applicant must show that "the errors at trial actually and substantially disadvantaged his defense so that he was denied fundamental fairness." McCoy v. Newsome, 953 F.2d at 1261.

To the extent the applicant attempts to asset the ineffectiveness assistance of trial counsel to excuse the procedural default, he fails because as discussed more fully above, trial counsel was not ineffective for requesting an instruction on the LIO of battery.

Because the applicant cannot show cause to excuse the procedural default, this Court need not consider whether he can demonstrate actual prejudice from the alleged constitutional violations. McCleskey v. Zant, 499 U.S. 467, 502, 111 S. Ct. 1454, 113 l. Ed. 2d 517 (1991). Moreover, the applicant has not demonstrated that this Court's failure to hear his claims will result in a fundamental miscarriage of justice. See McCoy v.

Newsom, 953 F.2d at 1262 (to demonstrate a fundamental miscarriage of justice, the applicant must produce evidence showing that he is actually innocent of the crimes for which he was convicted). Accordingly, this Court is barred from reaching the merits of the applicant's claim that the trial court violated his due process rights when it instructed the jury on the LIO of simple battery.

2. The Failure to Instruct the Jury on Accident

Nor did the trial court's refusal to instruct the jury on accident amount to a constitutional violation. Although the applicant raised this issue as an enumeration of error, (RX-9 at 4), the Georgia Court of Appeals did not specifically address the claim. Instead, it decided the issue of whether trial counsel was ineffective for failing to request a jury instruction on accident.[6] The Georgia Court of Appeals found that the applicant's "denial that he struck the victim with the crowbar at all foreclosed a claim that he struck the victim by accident." Emerson v. State,

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[6]It appears, however, that trial counsel did request a jury instruction on accident, (see R-18; RX-3 at 20), and that appellate counsel did not raise a claim of ineffective assistance of trial counsel for trial counsel's failure to request an instruction on accident. (See RX-9 at 2-3, 4).

222 Ga. App. at 567, 474 S.E. 2d at 640.

In determining whether an alleged jury instruction error provides a basis for habeas corpus relief, the Court must consider the alleged error as a whole in the context of the trial record, not in isolation. See Cupp v. Naughten, 414 U.S. 141, 146-47, 94 S. Ct. 396, 38 L. ed. 2d 368 (1973); see also Boyde v. California, 494 U.S. 370, 380, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990) (an error occurs only when there is a reasonable likelihood that the jury applied the instruction in an improper manner). Furthermore, even if the jury instructions are erroneous, habeas relief may be granted only if "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." Estelle v. McGuire, 502 U.S. 62, 72, 112 S. Ct. 475, 116 L. Ed, 2d 385 (1991) (citations omitted); Carrizales v. Wainwright, 699 F.2d 1053, 1055 (11th Cir. 1983) (improper jury instructions can never be the basis for federal habeas corpus relief unless the instructions rendered the whole trial so unfair as to amount to a denial of process). The court must find that the erroneous instruction "in the whole context of the particular case, has a substantial and injurious effect or influence on the jury's verdict." Calderon v. Coleman, 119 S. Ct. 500, 504 (1998)

Further, alleged instruction errors will be deemed harmless if "it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" Yates v. Evatt, 500 U.S. 391, 403, 111 S. Ct. 1884, 114 L. Ed. 2d 432 (1991) (quoting Chapman v. California, 386 U.S. 18, 24,. 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)), overruled in part by Estelle v. McGuire, 502 U.S. at 72 & n.4 (In review of an ambiguous instruction, the Court directed that the correct inquiry is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution."). As noted above, a reviewing court cannot look at one instruction in isolation, but must look at all of the court's instructions. Cupp, 414 U.S. at 141.

O.C.G.A. § 16-2-2 provides:

> A person shall not be found guilty of any crime committed by misfortune or accident where it satisfactorily appears there was no criminal scheme or undertaking, intention, or criminal negligence.

The applicant denied hitting the victim with a crowbar. (Tr2 at 350-51). He testified that while he and the victim were struggling, the crowbar lightly touched the victim's back, but did not strike the victim with force. (Id.). This testimony was inconsistent with the theory that the applicant struck the victim accidentally. See Connor v. State, 268 Ga. 656, 492 S.E. 2d 669 (1997). Therefore, the trial court's failure to give an instruction on accident did not render the applicant's trial fundamentally unfair; even if the trial court had instructed the jury on the principle of accident, it is unlikely that the outcome of the trial would have been different. Consequently, the applicant was not harmed by the trial court's refusal to give an accident instruction, and this ground does not entitle the applicant to habeas corpus relief.

D. The Applicant Was Not Denied Due Process When He Was Convicted of Simple Battery, an Offense Not Set Out in the Indictment (Ground I).

The applicant contends that he is entitled to habeas corpus relief because he did not receive fair notice that he could be

convicted of simple battery, an offense not set out in the indictment. As previously noted, the Georgia Court of Appeals refused to consider whether the conviction violated the applicant's due process rights because the attorney had requested the instruction on simple battery. Emerson v. State, 222 Ga. App. At 596, 474 S.E.2d at 639. This Court, therefore, must independently consider the merits of the claim. Neelley v. Nagle, 138 F.3d at 926.

The applicant cannot contend he received no notice of the crime for which he was convicted, as his attorney requested the LIO battery instruction.[7] Because of this request, his conviction is not constitutionally infirm. Jones v. Dugger, 888 F.2d 1340, 1343 911th Cir. 1989) (conviction for improper LIO of lewd and lascivious conduct in sexual battery prosecution did not violate due process because defense counsel requested a jury instruction on the improper LIO and because the improperly charged offense was lesser in degree and penalty than the main offense). This ground, therefore, does not entitle the applicant to habeas corpus

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[7]The Undersigned observes additionally that the indictment put the applicant on notice of the gist of the LIO.

relief.

CONCLUSION

For the reasons stated above,

IT IS HEREBY RECOMMENDED that the Application for Writ of Habeas Corpus [Doc. 1] be **DENIED.**

IT IS SO RECOMMENDED, this 17th day of May, 1999.

/s/ Joel M. Feldman

JOEL M. FELDMAN
UNITED STATES MAGISTRATE JUDGE

Supreme Court, U.S.
FILED
NOV 20 2000
CLERK

(2)

NO. 00-627

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN ALAN EMERSON,

Petitioner,

vs.

STANLEY TUGGLE and THURBERT BAKER,

Respondents.

On Petition For Writ Of Certiorari To The
United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals lacked authority to construe the Petitioner's notice of appeal as a motion for certificate of appealability.[1]

2. Whether the circuit judge lacked authority to address the issue of whether a certificate of appealability should be granted to the Petitioner.

3. Whether the decision of a single circuit judge concerning a certificate of appealability is subject to review by the entire court of appeals.

4. Whether the case record substantially shows that the Petitioner was denied federal constitutional rights by the state courts.

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1 Petitioner filed two separate notices of appeal in the Eleventh Circuit Court of Appeals. *See* Petitioner's Notice of Appeal, No. 99-12581-I and Petitioner's Notice of Appeal, No. 99-14640-I. In his Brief in Support of his Petition for Writ of Certiorari, Petitioner states that the judge did not indicate which notice of appeal (No. 99-12581-I or No. 99-146401-I) the Eleventh Circuit construed as a motion for a certificate of appealability. However, as this Brief explains, the first Question Presented to this Court by Petitioner can only involve Petitioner's First Notice of Appeal. As a result, Respondent objects to Petitioner's first Question Presented to the extent that it applies to both Notices of Appeal.

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OPINIONS BELOW

Petitioner has included as Appendix A, a copy of the Order from the United States Court of Appeals for the Eleventh Circuit denying Petitioner's Certificate of Appealability No. 99-12581-I, dated July 17, 2000. Petitioner has included as Appendix B, a copy of the Order from the United States Court of Appeals for the Eleventh Circuit denying Petitioner's Certificate of Appealability No. 99-12581-I, dated April 21, 2000. Petitioner has included as Appendix C, a copy of the Order from the United States Court of Appeals for the Eleventh Circuit dismissing Petitioner's Appeal No. 99-14640-I, dated May 30, 2000. Petitioner has included as Appendix D, a copy of the Order from the United States District Court denying Petitioner's Motion for a Certificate of Probable Cause, dated October 4, 1999. Petitioner has included as Appendix E, the Judgment denying Petitioner's request for a Writ of Habeas Corpus dated June 15, 1999. Petitioner has included as Appendix F, the Order of the United States District Court adopting the Report and Recommendation of the Magistrate Judge, dated June 10, 1999. Finally, Petitioner has included as Appendix G, a copy of the Report and Recommendation by the Magistrate Judge, United States District Court, denying Petitioner's request for a Writ of Habeas Corpus, dated May 17, 1999.

Respondent includes as Appendix H, attached hereto the Opinion of the Georgia Court of Appeals in Emerson v. State, 222 Ga.App. 596, 474 S.E.2d 638 (1996).

STATEMENT OF JURISDICTION

Respondent agrees with Petitioner's representation that this Court has jurisdiction under 28 U.S.C. § 1254(1) to review the denial of applications for certificates of appealability by a circuit judge or a panel of a court of appeals. *See* Hohn v. United States, 524 U.S. 236, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. § 1254(1)
2. 28 U.S.C. § 2253 (c)
3. Supreme Court Rule 15(2)
4. Federal Rule of Appellate Procedure 1(a)
5. Federal Rule of Appellate Procedure 22(b)
6. Federal Rule of Appellate Procedure 27(c)
7. Federal Rule of Appellate Procedure 35(a)
8. Federal Rule of Appellate Procedure 47(a)(1)
9. 11th Circuit Rule 22-1(c)
10. 11th Circuit Rule 27-1(d)(2) and (e)
11. 11th Circuit Rule 35-4

I. PROCEDURAL HISTORY

A. *State Court Proceedings*

On March 9, 1994, a Clayton County, Georgia grand jury returned indictment number 94-CR 1075-8 against Petitioner charging him with one count of aggravated assault. (App. G at 38). While represented by counsel, Petitioner was tried in the Clayton County Superior Court and convicted of a lesser offense of misdemeanor battery. *See* Emerson v. State, 222 Ga.App. 596, 474 S.E.2d 638 (1996). (App. G). In response, Petitioner filed a Motion for New Trial alleging that "(1) the court erred in (a) instructing the jury on battery, (b) refusing the defendant's request to instruct the jury on accident; (2) trial counsel rendered ineffective assistance; and (3) the evidence was insufficient to support the battery conviction." (App. G at 39). Petitioner also filed a Motion in Arrest of Judgment. Both motions were denied. (App. G at 39).

Petitioner appealed his conviction to the Georgia Court of Appeals. The Georgia Court of Appeals affirmed Petitioner's conviction and held that 1) the "trial court did not commit reversible error by instructing the jury on battery because [Petitioner's] counsel requested the charge;" 2) Defense counsel's request for a jury charge on battery did not constitute ineffective assistance of counsel; and 3) Defense counsel's failure to request jury charges on self-defense and accident did not constitute ineffective assistance of counsel because the evidence did not support such charges. Emerson, 222 Ga.App. at 596, 474 S.E.2d at 639-640. Petitioner later filed a Motion for Reconsideration in the Georgia Court of Appeals and a Petition for a Writ of Certiorari in the Georgia Supreme Court. Emerson, 222 Ga.App. at 596, 474 S.E.2d at 639. The Georgia Court of Appeals and the Georgia Supreme Court denied these requests for further review.

B. ***Federal Court Proceedings***

In January of 1997, Petitioner filed a request in the United States District Court for the Northern District of Georgia (hereinafter referred to as the "District Court") seeking the issuance of a writ of habeas corpus. The District Court denied the Petition for Writ of Habeas Corpus on or about June 10, 1999. (App. F). The District Court, adopting the magistrate judge's report and recommendation, held that 1) Petitioner's counsel was not ineffective; and 2) the trial court did not violate Petitioner's due process rights. (App. F and G).

Almost a month later on July 14, 1999, Petitioner filed a Motion for a Certificate of Probable Cause[2] in the District Court, as required by 28 U.S.C. § 2253(c)(1). The District Court denied Petitioner's Motion for a Certificate of Probable Cause because Petitioner failed to substantially show the denial of a constitutional right. (App. D).

Instead of filing an application for a certificate of appealability with the District Court as required by 28 U.S.C. § 2253, Petitioner filed two separate notices of appeal. Petitioner filed his first notice of appeal on July 14, 1999 and his second notice of appeal on November 30, 1999.

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2 Prior to the adoption of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a certificate of probable cause was required under 28 U.S.C. § 2253. Now 28 U.S.C. § 2253 provides that a judge must issue a certificate of appealability to appeal a district court's denial of a writ of habeas corpus. *See* 28 U.S.C. § 2253(c). A certificate of probable cause and a certificate of appealability require analytical determinations and are judged under the same standard. United States v. Monroe, 974 F.Supp. 1472 (N.D.Ga. 1997).

Petitioner filed his first notice of appeal from the District Court's decision to deny Petitioner's request for a writ of habeas corpus. *See* Petitioner's Notice of Appeal, Eleventh Circuit, No. 99-12581-I (hereinafter referred to as "Petitioner's first notice of appeal"). Petitioner's first notice of appeal was construed by the Eleventh Circuit as a "motion for a certificate of appealability." (App. B). In an order signed by Circuit Judge Charles R. Wilson, the Eleventh Circuit denied Petitioner's motion for a certificate of appealability because Petitioner "failed to make a substantial showing of the denial of a constitutional right."[3] (App. B). On May 12, 2000, Petitioner filed a "Suggestion for Rehearing *En Banc*" requesting that the entire court review United States Circuit Judge Charles R. Wilson's decision to deny Petitioner's motion for a certificate of appealability.[4] The Eleventh Circuit Court of Appeals construed Petitioner's "Suggestion for Rehearing *En Banc*" as a motion for reconsideration and again denied Petitioner's motion for a certificate of appealability.[5] (App. A).

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3 Petitioner suggests that the Eleventh Circuit Court of Appeals did not indicate which notice of appeal it construed as a motion for a certificate of appealability. The Eleventh Circuit, however, clearly declared Petitioner's first notice of appeal as an application for a certificate of appealability. (App. B). Petitioner's second notice of appeal, which was filed as to the district court's decision to deny Petitioner's Motion for a Certificate of Probable Cause, was denied for lack of jurisdiction. (App. C).

4 In his brief in support of his "Suggestion for Rehearing *En Banc*," Petitioner proffers the same arguments as he does in this Petition for Writ of Certiorari.

5 A two-judge panel denied Petitioner's motion for a certificate of appealability because Petitioner "has not made a substantial

Petitioner's second notice of appeal was filed from the District Court's decision to deny Petitioner's motion for a certificate of probable cause. *See* Notice of Appeal, Eleventh Circuit, No. 99-14640-I (hereinafter referred to as "Petitioner's second notice of appeal"). On May 30, 2000, the Eleventh Circuit, Judges Edmondson, Cox and Wilson presiding, denied Petitioner's second notice of appeal for lack of jurisdiction. (App. C). The Court opined that the "district court's October 4, 1999, order denying [Petitioner's] petition for certificate of probable cause is not a final and appealable decision." (App. C).

Petitioner now brings this Petition for Writ of Certiorari claiming that 1) the Court of Appeals lacked authority to construe Petitioner's notice of appeal as an application for a certificate of appealability;[6] 2) the circuit judge lacked authority to deny Petitioner's certificate of appealability; 3) the decision of a single circuit court judge denying a certificate of appealability should be reviewed by the entire Eleventh Circuit Court of Appeals; and 4) according to Petitioner, the record reflects a substantial showing of a denial of a constitutional right.

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showing of the denial of a constitutional right." (App. A).

6 As explained in subsection A(1) of Respondent's Argument and Citation of Authority of this Brief, Respondent objects to Petitioner's first Question Presented to the extent that it applies to both Notices of Appeal.

II. ARGUMENT AND CITATION OF AUTHORITY

A. The Eleventh Circuit Court of Appeals is Authorized by Law to Construe Petitioner's First Notice of Appeal as a Motion for a Certificate of Appealability.

1. *The first Question Presented to this Court by Petitioner can only involve Petitioner's First Notice of Appeal.*

Petitioner filed two separate notices of appeal in the Eleventh Circuit Court of Appeals. *See* Petitioner's Notice of Appeal, No. 99-12581-I and Petitioner's Notice of Appeal, No. 99-14640-I. In his Brief in Support of his Petition for Writ of Certiorari, Petitioner states that the judge did not indicate which notice of appeal (No. 99-12581-I or No. 99-146401-I) the Eleventh Circuit construed as a motion for a certificate of appealability.[7] *See* Petition for Writ of Certiorari at 7, 9. Petitioner's contention, however, is incorrect. The Eleventh Circuit construed Petitioner's first notice of appeal as an application for a certificate of appealability. (App. B). By

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7 In his Petition for Writ of Certiorari, Petitioner states that he "assumed that the Court of Appeals relied on 28 U.S.C. § 2253 and Federal Rule of Appellate Procedure 22(b) in construing petitioner's notice of appeal as a motion for a certificate of appealability. The Petitioner also assumed that such meaning was given to both notices of appeal." Petition for Writ of Certiorari at 8.

contrast, Petitioner's second notice of appeal was dismissed for lack of jurisdiction.[8] (App. C).

Because the Eleventh Circuit only construed Petitioner's first notice of appeal as a certificate of appealability, Respondent Tuggle objects to Petitioner's first question presented to the extent that it applies to both notices of appeal. *See* Supreme Court Rule 15(2). Any argument by Petitioner stating that the Eleventh Circuit lacked authority to construe his second notice of appeal as a certificate of appealability is inconsistent with the record.

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8 According to the Order as to Petitioner's second notice of appeal, the District Court's decision to deny Petitioner's "motion for a certificate of probable cause" is not a final and appealable decision. (App. C). Whether a denial of a certificate of appealability is a final appealable decision is unclear. The Eleventh Circuit, along with two other circuits, have held that a denial of a certificate of appealability is not a final appealable decision. (App. C). *See* Johnson v. United States, 188 F.3d 507 (6th Cir. 1999) (stating that "[t]he denial of a certificate of probable cause, is not appealable"); Greenawalt v. Stewart, 105 F.3d 1268 (9th Cir. 1997) (holding that the district court's denial of a certificate of probable cause to appeal a final order in a habeas corpus proceeding is not an appealable order); Johnson v. Wells, 915 F.2d 1572 (6th Cir. 1990) (holding that "[a]n order denying a certificate of probable cause is not an appealable order under 28 U.S.C. § 1291"). This Court, however, suggested in Hohn v. United States, 524 U.S. 236, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998) that a denial of a certificate of appealability is a final appealable decision when it held that the Supreme Court had jurisdiction to review a denial of an application for a certificate of appealability. Petitioner has not presented this question to this Court.

2. *The Court of Appeals had the Authority to construe Petitioner's First Notice of Appeal as a Certificate of Appealability.*

28 U.S.C. § 2253 requires a certificate of appealability to be issued prior to the appeal of a district court's order in a habeas corpus proceeding. *See* 28 U.S.C. § 2253. Petitioner argues that "there is no specific provision in 28 U.S.C. § 2253(c) which authorized the Court of Appeals to construe a notice of appeal as a request for a certificate of appealability." Petition for Writ of Certiorari at 8. Petitioner, however, ignores the fact that the Federal Rules of Appellate Procedure and the Rules of the United States Court of Appeals for the Eleventh Circuit (hereinafter "Eleventh Circuit Rules") govern the disposition of applications for a certificate of appealability.[9] *See* Hohn v. United States, 524 U.S. 236, 242-243, 118 S.Ct. 1969, 1973, 141 L.Ed.2d 242 (1998); Fed. R. App. P. 22(b)(1) and 11th Cir. R. 22-1(c)(2).

Under the Federal Rules of Appellate Procedure and the Eleventh Circuit Rules, a district court judge and a circuit court judge have the authority to issue a certificate of appealability. *See* Fed. R. App. P. 22(b)(1); 11th Cir. R. 22-1(c)(2); *see also* Edwards v. United States, 114 F.3d 1083 (11th Cir. 1997). A district court judge, however, must consider and rule upon the

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9 The Federal Rules of Appellate Procedure govern procedure in the court of appeals. *See* Fed. R. App. P. 1(a). The Federal Rules of Appellate Procedure also give authority to "each court of appeals acting by a majority of its judges" to "make and amend rules governing its practice." Fed. R. App. P. 47(a)(1). The Eleventh Circuit has adopted local rules of appellate procedure. Accordingly, both the federal and local rules of appellate procedure govern this petitioner's notice of appeal and application for a certificate of appealability.

propriety of issuing a certificate of appealability before a request for a certificate of appealability will be received or acted upon by a circuit court judge.[10] *See* United States v. Monroe, 974 F.Supp. 1472 (N.D.Ga. 1997). Fed. R. App. P. 22(b) specifically states that the district court is required to "either issue a certificate of appealability or state why a certificate should not issue." In the case *sub judice*, the District Court denied Petitioner's Motion for a Certificate of Probable Cause because Petitioner failed to make a substantial showing of the denial of a constitutional right. (App. D).

If a district court judge denies an application for a certificate of appealability, as the District Court judge did in this case, the applicant may request a circuit court judge to issue a certificate of appealability. *See* Fed. R. App. P. 22(b)(2); 11th Cir. R. 22-1(c)(2). An appellate court, however, will not consider the merits of a petition for habeas corpus without a certificate of appealability. *See* 28 U.S.C. § 2253(c); Clements v. Wainwright, 648 F.2d 279 (5th Cir. 1981) (stating that an appeal may not proceed until a certificate of probable cause is issued).

Fed. R. App. P. 22(b)(2) specifically states that, "[a] request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, **the notice of appeal constitutes a request addressed to the judges of the court of**

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10 By requiring a district court to determine the propriety of a certificate of appealability prior to a circuit court's ruling on this issue, the rules allow the "court most familiar with the case to have the first word and allows the appellate court the great benefit of having the district judge's views on the need for an appeal." Edwards v. United States, 114 F.3d 1083, 1084 (11th Cir. 1997).

constitutes a request addressed to the judges of the court of appeals." (*Emphasis supplied*). Similarly, 11th Cir. R. 22-1(c)(1) states:

> if the District Court denies a certificate of appealability, and at the time of docketing the appeal in the court of appeals the applicant has not filed a renewed application for a certificate of appealability in the court of appeals, the application denied by the district court (construed and filed as a notice of appeal) **shall be construed by the court of appeals as a renewed application for a certificate of appealability.**

(*Emphasis supplied*)

In this case, Petitioner filed a Motion for a Certificate of Probable Cause in the District Court. At the same time, Petitioner filed his first notice of appeal in the Eleventh Circuit Court of Appeals seeking the review of the District Court's denial of Petitioner's request for a Writ of Habeas Corpus. When, as here, a certificate of appealability has not been granted by the district court, both the federal and local rules of appellate procedure require a notice of appeal to be construed as an application for a certificate of appealability. *See* Fed. R. App. P. 22(b)(1) and 11th Cir. R. 22-1(c)(2). Thus, the Eleventh Circuit had the authority and obligation to construe Petitioner's first notice of appeal as an application for a certificate of appealability. *See, e.g.*, Slack v. McDaniel, 529 U.S. 473, 120 S.Ct. 1595, 141 L.Ed.2d 542 (2000).

Since the Eleventh Circuit had express authority under 28 U.S.C. § 2253, Fed. R. App. P. 22(b) and 11th Cir. R. 22-1(c)(1) to construe Petitioner's notice of appeal as a motion for

certificate of appealability, this Petition for a Writ of Certiorari should be denied.

B. A Single Circuit Judge is authorized by Law to deny a Motion for Certificate of Appealability.

The United States Code and the federal and local rules of appellate procedure allow a single judge to decide whether to issue a certificate of appealability. *See* Fed. R. App. P. 22-1(b)(1) and 11th Cir. R. 27-1(d). "That [the United States Code and the federal and local rules] permit[] the certificate to be issued by a 'circuit justice or judge,' [however,] does not mean the action of the circuit judge in denying the certificate is his or her own action, rather than the action of the court of appeals to whom the judge is appointed." Hohn v. United States, 524 U.S. 236, 241-242, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998). To the contrary, the order is issued in the name of the court and under its seal. Hohn, 524 U.S. at 236, 242, 118 S.Ct. at 1969, 1973.

Petitioner argues that Fed. R. App. P. 22(b) and 28 U.S.C. § 2253(c) "do not expressly authorize a single judge to consider whether a certificate of appealability should be granted where no request for such certificate was made to the Court of Appeals." Petition for a Writ of Certiorari at 10. Petitioner's argument is without merit. This is true even if this Court construes the order signed by Circuit Judge Charles R. Wilson as an action taken by a "single judge."

The United States Code and the federal and local rules of appellate procedure specifically allow a single judge to rule on an application for a certificate of appealability. 28 U.S.C. § 2253(c) states that "[u]nless a **circuit justice or judge** issues a certificate of appealability, an appeal may not be taken to the

court of appeals from. . .the final order in a habeas corpus proceeding" (*Emphasis supplied*). Likewise, Fed. R. App. P. 22(b) forbids "an appeal unless a **circuit justice** or a **circuit or district judge** issues a certificate of appealability under 28 U.S.C. § 2253(c)." (*Emphasis supplied*). *See* Hohn, 524 U.S. at 244, 118 S.Ct. at 1974 (stating that Fed. R. App. P. 22 "by no means prohibits application to an individual judge, nor could it, given the language of the statute"). 11th Cir. R. 27-1(d) also states that "a **single judge** is authorized to act, subject to review by the court" on motions "for certificates of appealability." (*Emphasis supplied).*

Petitioner seems to suggest that Fed. R. App. P. 22(b) should not apply to this case because Petitioner did not file an express request for a certificate of appealability. Petition for Writ of Certiorari at 10-11. By filing his notice of appeal, however, Petitioner effectively filed an application for a certificate of appealability.[11] Fed. R. App. P. 22(b) states that "[i]f no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals." A request addressed to the judges of the court of appeals "may be considered by a circuit judge or judges as the court prescribes." Fed. R. App. P. 22(b). The result is the same under the Eleventh Circuit Rules which grant a single judge the authority to act on motions for certificates of appealability. 11th Cir. R. 27-1(d)(2).

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11 The Federal Rules and Eleventh Circuit Rules of Appellate Procedure mandate that a notice of appeal be construed as an application of a "certificate of appealability" if one has not been filed. *See* Fed. R. App. P. 22(b) and 11th Cir. R. 27-1(d)(2).

Both federal and local rules of appellate procedure require that a notice of appeal be construed as an application for a certificate of appealability. *See* Fed. R. App. P. 22(b) and 11th Cir. R. 22-1(c)(2). This is true even if this Court does not construe Petitioner's first notice of appeal as an "express request for a certificate." *See* Fed. R. App. P. 22(b).

C. Petitioner Was Not Entitled to an *En Banc* Review of Judge Wilson's Denial of His Application for a Certificate of Appealability.

Pursuant to the federal and local rules of appellate procedure, the action of a single judge may be reviewed by the court of appeals. Fed. R. App. P. 27(c) provides that the court of appeals "**may** review the action of a single judge." (*Emphasis added*). Similarly, 11th Cir. R. 27-1(d) states that "a **single** judge is authorized to act, subject to review by the court." (*Emphasis added*).

In this case, Judge Wilson's denial of Petitioner's application for a certificate of appealability was reviewed by a two-judge panel as provided by 11th Cir. R. 27-1(e). While Petitioner argues that the decision of the circuit judge is subject to "*en banc* review," Petitioner cites no authority to support his position. *See* Petition for a Writ of Certiorari at 11-13. To the contrary, pursuant to Fed. R. App. P. 35(a) "[a]n *en banc* hearing or rehearing is not favored and ordinarily will not be ordered." In fact, an *en banc* hearing will not be ordered unless it is 1) necessary to secure or maintain uniformity of the court's decisions; or 2) the proceeding involves a question of exceptional importance. *See* Fed. R. App. P. 35(a). Petitioner has not made any argument to even suggest that a rehearing *en banc* would bring uniformity to the court's decisions or that this case involves a question of exceptional importance.

It is probable that the Eleventh Circuit never intended a certificate of appealability to be subject to an *en banc* review by the court. The Eleventh Circuit Rules provide that "interim matters" such as "stay orders, injunctions pending appeal, appointment of counsel, leave to appeal *in forma pauperis*, and leave to appeal from a non-final order" are not subject to *en banc* consideration. 11th Cir. R. 35-4.

The Eleventh Circuit denied Petitioner's second notice of appeal from the District Court's denial of Petitioner's Motion for a Certificate of Probable Cause, because a certificate of appealability "is not a final and appealable decision." (App. C). According to this Order, the Eleventh Circuit construes motions for certificates of appealability as interim matters. As such, Petitioner's Suggestion for Rehearing *En Banc* was treated as "a request for rehearing or reconsideration" to "the judge or panel that entered the order sought to be reheard." 11th Cir. R. 35-4.

Upon review, a two-judge panel again denied Petitioner's application for a certificate of appealability because Petitioner "has not made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). (App. A). Since the Court reviewed the denial of Petitioner's certificate of appealability and an *en banc* review is not required, this Court should deny this Petition for a Writ of Certiorari.

D. Petitioner Is Not Entitled to a Certificate of Appealability Because the Record Does Not Support a Substantial Showing of a Denial of Any Constitutional Right.

A certificate of appealability will issue "only if the [petitioner] has made a substantial showing of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(2). "Such a

showing requires the applicant to demonstrate that the issues are debatable among jurists of reason, that a court could resolve the issues in a different manner, or that the questions are adequate to deserve encouragement to proceed further." Clark v. Johnson, 227 F.3d 273, 277 (5th Cir. 2000); *see* Greenawalt v. Stewart, 105 F.3d 1268 (9th Cir. 1997).

As stated earlier, a certificate of appealability should not be issued unless Petitioner exhibits a substantial showing of a denial of a constitutional right. *See* 28 U.S.C. § 2253. Both the District Court and the Eleventh Circuit Court of Appeals denied Petitioner's application for a certificate of appealability because Petitioner had not made a "substantial showing of the denial of a constitutional right." (App. B). Ruling upon Petitioner's Motion for Reconsideration, a two-judge panel agreed with the District Court and the circuit judge's decision to deny Petitioner's motion for a certificate of appealability. (App. A). Now, Petitioner requests that this Court grant a Writ of Certiorari to review the Eleventh Circuit's decision to deny Petitioner's application for a certificate of appealability. Pursuant to Hohn v. United States, 524 U.S. 236, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998), this Court may review a court's denial of an application for a certificate of appealability under 28 U.S.C. § 1254(1).

Petitioner proffers two reasons to support his contention that a certificate of appealability should issue. First, Petitioner contends that he was denied due process when he was indicted on a felony charge of aggravated assault but was convicted of misdemeanor battery. *See* Petition for a Writ of Certiorari at 13-20. Second, Petitioner argues that he was denied effective assistance of counsel when his attorney submitted the jury charge of misdemeanor battery and failed to submit the jury charges of self-defense and accident. *See* Petition for a Writ

of Certiorari at 13-20. As to both claims, Petitioner does not exhibit a substantial showing of a denial of a constitutional right.

Both of Petitioner's contentions stem from instructions given to the jury. "[A] federal court of appeals, [does] not have the final say on what instructions a [jury] charge must contain in order to accurately state Georgia law." Agan v. Vaughn, 119 F.3d 1538, 1545 (11th Cir. 1997). Instead, jury instructions are within the purview of the state courts because they are the final arbiters of state law. *See id.* Thus, a federal court's limited role on habeas review, when faced with a challenge to a state law jury charge, "is to determine whether any error or omission in the jury charge was so prejudicial as to amount to a violation of due process." Agan, 119 F.3d at 1538. Accordingly, a defendant's right to due process is not violated by a state law jury charge, unless such charge was so misleading as to make the trial unfair. *See* Estell v. McGuire, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); Pulley v. Harris, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984) ("A federal court may not issue the writ on the basis of a perceived error of state law").

In this case, the jury charge regarding misdemeanor battery was not so misleading as to make the trial unfair. To the contrary, the verdict was extremely lenient compared to the evidence presented at trial. (App. G at 51); *see* Emerson, 222 Ga.App. at 597, 474 S.E.2d at 640. "But for counsel's request for the battery charge, given the overwhelming evidence of guilt, it is highly likely that Emerson would have been convicted of aggravated assault." Emerson v. State, 222 Ga.App. 596, 474 S.E.2d 638 (1996). (App. G). Moreover, Petitioner's counsel requested the charge. (App. G at 54); Emerson v. State, 222 Ga.App. 596, 474 S.E.2d 638 (1996). Since Petitioner's due process rights were not violated, this

Court should not grant this Petition for Writ of Certiorari. (App. G); *see* Emerson v. State, 222 Ga.App. 596, 474 S.E.2d 638 (1996).

Petitioner's claim for ineffective assistance of counsel should also fail. To prevail on a claim of ineffective assistance of counsel, a petitioner must show (1) that counsel's performance was deficient; and (2) that the deficient performance prejudiced the defendant. *See* Holsomback v. White, 133 F.3d 1382 (11th Cir. 1998) (referring to Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). To determine whether counsel's performance was deficient, a court should consider the reasonableness of the challenged conduct. If the challenged conduct is unreasonable, Petitioner must also show that such conduct was prejudicial. A deficiency is prejudicial where "there is reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." White, 133 F.3d at 1386. Petitioner has not alleged nor can he prove such unprofessional errors. The Georgia Court of Appeals stated that "Emerson failed to demonstrate that he was prejudiced by what was undoubtedly a tactical decision." Emerson, 222 Ga.App. at 597, 474 S.E.2d at 638; (App. G at 52).

"[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Holsomback v. White, 133 F.3d 1382, 1387 (11th Cir. 1998). Whether a particular decision by counsel was a tactical one is a question of fact, and the state court's resolution of that issue enjoys a strong presumption of correctness. *See id.* at 1386. Whether a particular decision was reasonable, however, is a question of law which is reviewable *de novo*. *See id.* at 1387.

In the case *sub judice*, counsel's decisions were reasonable. According to the Georgia Court of Appeals, without counsel's charge on misdemeanor battery as a lesser included offense of assault, "given the overwhelming evidence of guilt, it is highly likely that Emerson would have been convicted of aggravated assault." Emerson, 222 Ga.App. at 597, 474 S.E.2d at 640; (App. G at 53). Likewise, Petitioner's counsel was not ineffective for failing to request the trial court to instruct the jury on the issues of accident and self-defense. (App. G at 60). *See* Emerson, 222 Ga.App. at 596, 474 S.E.2d at 638. Petitioner denied ever striking the victim. (App. G at 52); *see* Emerson, 222 Ga.App. at 596, 474 S.E.2d at 638. Thus, a request to charge on accident or self-defense would have been inappropriate because the evidence did not support either charge. (App. G at 52). *See* Emerson, 474 S.E.2d at 638; *see also* Peterson v. State, 212 Ga.App. 147, 441 S.E.2d 481 (1994).

Since Petitioner cannot show that the jury charges were so misleading as to constitute an unfair trial, he has not made a substantial showing of a denial of due process. Likewise, Petitioner has not shown that his counsel's performance was deficient or that he was prejudiced by any deficient performance. Accordingly, the Eleventh Circuit Court of Appeals did not err when it denied Petitioner's application for a certificate of appealability on the basis that he failed to make a substantial showing of the denial of a constitutional right. As a result, this Petition for Writ of Certiorari should be denied.

III. CONCLUSION

For the foregoing reasons and citations of authority, Respondent Tuggle respectfully requests that this Court deny the Petition for Writ of Certiorari.

This 20th day of November, 2000.

Respectfully submitted,
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APPENDIX I

FULL TEXT OF CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. § 1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

2. 28 U.S.C. § 2253 (c)

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or(B) the final order in a proceeding under section 2255.

3. Supreme Court Rule 15

2. A brief in opposition should be stated briefly and in plain terms and may not exceed the page limitations specified in Rule 33. In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived

misstatement made in the petition. Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition.

4. Fed. R. App. P. 1

(a) Scope of Rules.

(1) These rules govern procedure in the United States courts of appeals.

(2) When these rules provide for filing a motion or other document in the district court, the procedure must comply with the practice of the district court.

(b) Rules Do Not Affect Jurisdiction. These rules do not extend or limit the jurisdiction of the courts of appeals.

(c) Title. These rules are to be known as the Federal Rules of Appellate Procedure.

5. Federal Rule of Appellate Procedure 22

(b) Certificate of Appealability.

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. §§ 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. §§ 2253(c). If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue. The district clerk

must send the certificate or statement to the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

(2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.

6. Federal Rule of Appellate Procedure 27

(c) Power of a Single Judge to Entertain a Motion. A circuit judge may act alone on any motion, but may not dismiss or otherwise determine an appeal or other proceeding. A court of appeals may provide by rule or by order in a particular case that only the court may act on any motion or class of motions. The court may review the action of a single judge.

7. Federal Rule of Appellate Procedure 35

(a) When Hearing or Rehearing En Banc May Be Ordered. A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(2) the proceeding involves a question of exceptional importance.

8. Fed. R. App. P. 47(a)(1)

a) Local Rules.

(1) Each court of appeals acting by a majority of its judges in regular active service may, after giving appropriate public notice and opportunity for comment, make and amend rules governing its practice. A generally applicable direction to parties or lawyers regarding practice before a court must be in a local rule rather than an internal operating procedure or standing order. A local rule must be consistent with--but not duplicative of--Acts of Congress and rules adopted under 28 U.S.C. §§ 2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. Each circuit clerk must send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure when it is promulgated or amended.

9. 11th Circuit Rule 22-1

(c) When an application for a certificate of appealability is acted upon by the district court, but the applicant has not filed a notice of appeal:

(1) the district court shall construe the application for a certificate of appealability as also a notice of appeal, and file it as such; and

(2) if the district court denies a certificate of appealability, and at the time of docketing the

appeal in the court of appeals the applicant has not filed a renewed application for a certificate of appealability in the court of appeals, the application denied by the district court (construed and filed as a notice of appeal) shall be construed by the court of appeals as a renewed application for a certificate of appealability.

10. 11th Circuit Rule 27-1

(d) Motions Acted Upon by a Single Judge. Under FRAP 27(c), a single judge may, subject to review by the court, act upon any request for relief that may be sought by motion, except to dismiss or otherwise determine an appeal or other proceeding. Without limiting this authority, a single judge is authorized to act, subject to review by the court, on the following motions:

(2) for certificates of appealability under FRAP 22(b) and 28 U.S.C. §§ 2254;

(e) Two-Judge Motions Panels. Specified motions as determined by the court may be acted upon by a panel of two judges.

11. 11th Circuit Rule 35-4

Administrative and interim matters (such as stay orders, injunctions pending appeal, appointment of counsel, leave to appeal in forma pauperis, and leave to appeal from a non-final order) are not subject to en banc consideration under FRAP 35. En banc petitions will not be entertained in such matters but will be referred as a request for rehearing or reconsideration to the

judge or panel that entered the order sought to be reheard.

APPENDIX H

474 S.E.2d 638

222 Ga.App. 596

Court of Appeals of Georgia.

EMERSON
v.
The STATE.
No. A96A1162.
Aug. 5, 1996.
Reconsideration Denied
Aug. 23, 1996.

Certiorari Denied Nov. 22, 1996.

Defendant, who was indicted on charge of aggravated assault, was convicted upon jury verdict in Superior Court, Clayton County, Simmons, J., on lesser offense of misdemeanor battery. Defendant appealed. The Court of Appeals, Harold R. Banke, Senior Appellate Judge, held that: (1) jury instruction on battery did not constitute reversible error; (2) defense counsel's request for charge on battery did not constitute ineffective assistance; and (3) counsel's failure to request charges on self-defense and accident did not constitute ineffective assistance of counsel.

Affirmed.

John Alan Emerson was indicted on a charge of aggravated assault, but convicted on the lesser offense of misdemeanor battery. He enumerates five errors, most of

which challenge the jury instructions trial counsel requested or failed to request.

The State's evidence at trial revealed that this case arose after the victim, Emerson's supervisor at Delta Airlines, instructed Emerson to leave the break area and get back to work. Another employee informed the victim that after receiving this instruction Emerson had thrown his coffee all over the break area. The victim then located Emerson, instructed him to clean up the mess, and went into an office to use the telephone. Emerson walked into the office, admitted that he was about to "lose it," and struck the victim in the head with a crowbar. The resulting laceration required 14 staples. The victim then struggled with Emerson, who had raised the crowbar to strike again. The victim subsequently filed a civil suit against Emerson. Held:

1. The trial court did not commit reversible error by instructing the jury on battery because Emerson's counsel requested the charge. Such self-induced error cannot be complained of on appeal. Griffith v. State, 188 Ga.App. 789, 790, 374 S.E.2d 359 (1988). Therefore, we need not reach Emerson's arguments that the conviction violated his due process rights.

2. We reject Emerson's contention that his counsel was ineffective for (a) requesting the charge on battery; (b) failing to request a charge on self-defense; and (c) failing to request a charge on accident. To establish ineffectiveness, a defendant must prove that his trial [222 Ga.App. 597] counsel's performance was deficient and the deficiency prejudiced his defense to the extent that there was a reasonable probability the result of the trial would have been different but for defense counsel's unprofessional deficiencies. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674

(1984); Brown v. State, 257 Ga. 277, 278(2), 357 S.E.2d 590 (1987). Review of counsel's performance, however, must be highly deferential. Rogers v. State, 195 Ga.App. 446, 448(2), 394 S.E.2d 116 (1990). Tactical errors do not constitute ineffective assistance. Keanum v. State, 212 Ga.App. 662, 664(3), 442 S.E.2d 790 (1994). Moreover, we need not inquire into counsel's alleged deficiency, absent a showing of prejudice. Trammel v. State, 265 Ga. 156(1), 454 S.E.2d 501 (1995).

(a) Emerson failed to make the requisite showing of prejudice with regard to his assertion that counsel was ineffective for requesting the battery charge. The evidence against Emerson was overwhelming. In addition to the victim's testimony, other corroborating witnesses saw Emerson argue with the victim, throw the coffee, retrieve his crowbar from his tool chest, follow the victim with crowbar in hand, raise the crowbar, and swing it. They also testified to breaking up the ensuing struggle. But for counsel's request for the battery charge, given the overwhelming evidence of guilt, it is highly likely that Emerson would have been convicted of aggravated assault. *See* Postell v. State, 212 Ga.App. 868, 870, 443 S.E.2d 530 (1994). Because Emerson failed to demonstrate that he was prejudiced by what was undoubtedly a tactical decision, the trial court did not clearly err in finding that Emerson's counsel was not ineffective. Powell v. State, 210 Ga.App. 409, 414(6)(c), 437 S.E.2d 598 (1993).

(b) Emerson's counsel was not ineffective for failing to request a charge on self-defense because the evidence did not support that charge. Emerson's counsel testified that before trial Emerson denied ever striking the victim with the crowbar, a statement in keeping with Emerson's trial testimony. Because such testimony was inconsistent with the theory that Emerson struck the victim with the crowbar in self-defense, the decision

not to request that charge was appropriate. Peterson v. State, 212 Ga.App. 147, 152(4), 441 S.E.2d 481 (1994).

(c) This same reasoning applies to Emerson's claim of ineffectiveness for failing to request an accident charge. Emerson's denial that he struck the victim with the crowbar at all foreclosed a claim that he struck the victim by accident. *See id.*

Judgment affirmed.

McMURRAY, P.J., and RUFFIN, J., concur.